the common law distinguishes between the feminine crime of being a common scold and its masculine counterpart of being a common railer and brawler. Perhaps the motive for the distinction was not so consciously a social interest, but it is hard to believe that the principle involved was not dimly perceived. In the case before us the judge quotes Genesis: "Male and female created He them." Then he adds, "It required no anatomist or physiologist or psychologist or psychiatrist to tell the legislature that women are different from men."

ACTIONABLE INJURIES IN STREET REGULATION. — The right of a state to appropriate private property for the construction of roads and streets is an aspect of the general right of eminent domain. It seems probable that there is a common-law obligation to compensate the private owner;[1] but whether this obligation exists or not is perhaps an academic question, since its enforcement is generally subject to constitutional limitation or statutory regulation.

In England, since 1845, compensation has been allowed by act of Parliament for property "injuriously affected" by the construction of public works.[2] In the United States, the limitation imposed by the Fifth Amendment[3] applies only to the federal government;[4] but the exercise of the power by the states has been limited by nearly all of the state constitutions,[5] the typical provision being to the effect that private property may not be taken for public use without just compensation.

The right of a private owner to recover for injuries sustained through street regulation under such a constitutional provision depends upon the construction of the words "property," "taken," and "just compensation." If there has been a physical occupation of property, or a divesting of title, the provision is clearly applicable. And where part only of a tract[6] is taken, compensation must include not merely the value of that part, but also the damage to the remainder caused by the taking, and by the use for the purpose proposed.[7] So, where the grade of a new street is to be established above or below the natural surface of the tract, and the remaining land is thereby rendered less valuable, this depreciation is an element of damage.[8] A recent case in the New York Supreme Court, *In re Skillman Ave.*,[9] would seem, however, to deny this principle. There,

---

[1] See 1 LEWIS, EMINENT DOMAIN, 3 ed., § 4; 3 SEDGWICK ON DAMAGES, 9 ed., § 1107.

[2] LANDS CLAUSES CONSOLIDATION ACT 1845, 8 & 9 VICT., c. 18.

[3] ". . . nor shall private property be taken for public use without just compensation." Art. V, AMENDMENTS, U. S. CONSTITUTION.

[4] Barron *v.* The Mayor, etc. of Baltimore, 7 Pet. (U. S.) 243 (1833).

[5] See 1 LEWIS, EMINENT DOMAIN, 3 ed., §§ 9, 15–61.

[6] "In assessing damages, . . . the inquiry is limited to the tract of land immediately affected. This is held to be so much as belongs to the proprietor whose land is taken, and is continuous with it, and used together for a common purpose." 3 SEDGWICK ON DAMAGES, 9 ed., § 1154.

[7] "In making appraisals of this kind, the true rule . . . is to determine what will be the effect of the proposed change upon the market value of the property. The proper inquiry is, what is it now fairly worth in the market, and what will it be worth after the improvement is made." Harris, J., in Troy & Boston R. R. *v.* Lee, 13 Barb. (N. Y.) 169, 171 (1852).

[8] *In re* Lafayette Ave., 147 N. Y. Supp. 839 (1913); Patton *v.* Philadelphia, 175 Pa. St. 88, 34 Atl. 344 (1896).

[9] 177 N. Y. Supp. 767 (1917). See RECENT CASES, *infra*, p. 476.

part of an unoccupied plot was taken for a street, and the owner claimed compensation for damage to the remainder caused by the use to which the city intended to put the land taken, namely, a public street at a grade several feet below the natural level of the land. The court denied recovery for this damage, saying: "The opening of a new street is a benefit to every foot and parcel of vacant land adjoining it, and, while the benefit may vary, it must be in every case substantial. No vacant land can therefore be held to be damaged by and through the very means and agency which every one concedes, and by law must assume, is a benefit." In a later case, however, *In re Putnam Ave. West*,[10] the same court allowed recovery for similar damage where the proposed street was to be constructed at a grade from twenty-one to twenty-five feet above the natural level of the property. These words of the court sufficiently indicate the error in the first case: "The claim for damages suffered by the taking *in invitum* is one thing, and the assessment for benefit is another. The latter is a matter of taxation, wherein the benefits are to be equitably adjusted between the owners of lands within the area of benefit." The latter case not only represents the sounder view, but accords with the weight of decision.

A more difficult problem is presented by regulation subsequent to the establishment of a street. Abutting proprietors may find their property seriously damaged by either of two causes: first, repair and regrading, or, second, use of the street for purposes other than the normal foot and vehicular traffic. We are concerned here only with the first situation. That the abutter is remediless for damage caused by the regrading of a city's streets, if the work was done pursuant to legal authority and executed with due care, seems to have been the original view.[11] The *rationes decidendi* of these cases seem to be, first, that as repair and regrading are incidental to the maintenance of a street, the injury must have been compensated in the original proceeding, and second, that as there is no occupation of additional property, there is no "taking" of "property" within the constitutional provision. The first reason is sound if the alteration was contemplated when the street was established, but if it was not, the possibility of damage in the future by reason of possible change would seem to be purely speculative. It is submitted that the second reason is based upon the erroneous conception that property in the legal sense is the *res*. But property is not so much land and things, as it is the sum of legal rights which the owner enjoys with reference to the *res*.[12] Among these is the sheaf of reciprocal rights which the land-

[10] 177 N. Y. Supp. 768 (1919). See RECENT CASES, *infra*, p. 476.

[11] Callender *v.* Marsh, 1 Pick. (Mass.) 418 (1823); Radcliff's Executors *v.* Mayor of Brooklyn, 4 N. Y. 195 (1850); Smith *v.* Washington, 20 How. (U. S.) 135 (1857); O'Connor *v.* Pittsburg, 18 Pa. St. 187 (1851).

[12] "The word 'property' . . . should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such." Shaw, C. J., in Old Colony & Fall River R. R. Co. *v.* County of Plymouth, 14 Gray (Mass.), 155, 161 (1859). "If the land 'in its corporeal substance and entity' is 'property,' still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make property valuable." Smith, J., in Eaton *v.* B. C. & M. R. R., 51 N. H. 504, 512 (1872).

owner enjoys in association with his neighbors, expressed in the maxim *sic utere tuo ut alienum non laedas*. So, if in raising the grade of a street there is an encroachment of the filling upon the abutting land,[13] or a backing of water so as to overflow it,[14] or an obstruction to a natural watercourse to the injury of adjoining land,[15] compensation must be made. The right of lateral support is also a part of the abutter's property, and recovery has been allowed when the lowering of the street grade has caused an actual subsidence of part of the adjacent land.[16] In addition to these, new rights are gained with the establishment of the street — easements of access, of light and air.[17] If a street is vacated and closed in front of property, there is a taking of these appurtenant easements for which compensation must be made.[18] It would seem that the raising or lowering of the street grade may have an equivalent effect. But as these rights are considered to be qualified, that is, subject to usual street uses, and as a change of grade is a normal street use, there is no taking of property if these rights are interfered with by regrading.[19] It is evident, however, that an alteration of these easements may cause great damage to abutting property. Recognition of this hardship has led to the enactment of statutes in many jurisdictions giving compensation for all injuries incident to a change of grade.[20] Beginning with Illinois in 1870, several states [21] have revised their constitutions, providing that private property shall not be "taken *or damaged*" for public use without just compensation. All damage resulting to abutting property by reason of a change of street grade should be within such a provision.[22]

THE NATURE OF SALVAGE SERVICE. — Remuneration to those who have saved property from destruction at sea is said to be taken from the Roman law of *negotiorum gestio*, by which one who, without contract, had cared for the business or the property of an absent person was entitled to be compensated for his outlay.[1] But it should be noted that the doctrine of salvage goes beyond the Roman law. In England prior to the seventeenth century the right of a salvor was a precarious one, being almost wholly dependent upon the generosity of the Lord High Admiral or upon that of

[13] Vanderlip *v.* Grand Rapids, 73 Mich. 522, 41 N. W. 677 (1889); Hendershot *v.* Ottumwa, 46 Ia. 658 (1877); Broadwell *v.* City of Kansas, 75 Mo. 213 (1881).

[14] Pumpelly *v.* Green Bay Co., 13 Wall. (U. S.) 166 (1871); Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308, 320, 321 (1874).

[15] Conniff *v.* San Francisco, 67 Cal. 45, 7 Pac. 41 (1885).

[16] Dyer *v.* St. Paul, 27 Minn. 457 (1881); Nichols *v.* City of Duluth, 40 Minn. 389, 42 N. W. 84 (1889); Park *v.* Seattle, 5 Wash. 1, 31 Pac. 310 (1892).

[17] Williams *v.* Los Angeles, 150 Cal. 592, 89 Pac. 330 (1907); Story *v.* N. Y. St. Ry. Co., 90 N. Y. 122 (1882). See 1 LEWIS, EMINENT DOMAIN, 3 ed., § 120.

[18] Pearsall *v.* Supervisors, 74 Mich. 558, 42 N. W. 77 (1889); Egerer *v.* N. Y. Cent. and H. R. R. Co., 130 N. Y. 108, 29 N. E. 95 (1891); Heinrich *v.* St. Louis, 125 Mo. 424, 28 S. W. 626 (1894).

[19] McCullough *v.* Village of Campbellsport, 123 Wis. 334, 101 N. W. 709 (1904).

[20] See 1 LEWIS, EMINENT DOMAIN, 3 ed., §§ 316–335, for collection of statutes.

[21] See 1 LEWIS, EMINENT DOMAIN, 3 ed., § 346, note 16.

[22] City of Bloomington *v.* Pollock, 141 Ill. 346, 31 N. E. 146 (1892); Sheehy *v.* Kansas City Cable Ry. Co., 94 Mo. 574, 7 S. W. 579 (1887).

[1] See The Calypso, 2 Hagg. Adm. 209, 218 (1828). Also see DIG., III, 5.